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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENDRICK D. CHESTER,

Defendant and Appellant.

B271587

(Los Angeles County
Super. Ct. No. NA100648)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Mark C. Kim, Judge. Affirmed.

Lori Nakaoka, under appointment by the Court of Appeal,
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant Attorney
General, Margaret E. Maxwell and Nicholas J. Webster, Deputy
Attorneys General, for Plaintiff and Respondent.

Appellant Kendrick D. Chester challenges his convictions for robbery and possession of a firearm by a felon. He contends that the trial court violated his constitutional rights by denying his requests to substitute his retained counsel and to represent himself, by admitting a tainted in-court identification of him, and by refusing to sever the charges into separate trials. We affirm.

FACTS AND PROCEEDINGS BELOW

An information charged Chester with two counts—robbery, in violation of section 211 of the Penal Code (count 1),¹ and possession of a firearm by a felon, in violation of section 29800, subdivision (a)(1) (count 2)—related to events that occurred in the very early hours of October 24, 2015. The information also charged Chester with three additional counts pertaining to separate events in the weeks prior. These latter charges included: one count of criminal threats, in violation of section 422, subdivision (a) (count 3); one count of assault with a semi-automatic firearm, in violation of section 245, subdivision (b) (count 4); and an additional count of possession of a firearm by a felon, in violation of section 29800, subdivision (a)(1) (count 5).²

A jury found Chester guilty of counts 1 and 2, for robbery and possession of a firearm by a felon, respectively. The jury also found true an allegation pursuant to section 12022.53, subdivision (b), that Chester personally used a firearm in the robbery. The jury could not reach a unanimous verdict on the other three counts. The trial court declared a mistrial on these counts and ultimately dismissed them on the People’s motion. The court sentenced

¹ Unless otherwise specified, subsequent statutory references are to the Penal Code.

² The information alleged a sixth count of criminal threats, but the prosecution dropped this charge prior to trial.

Chester to a total of 15 years in prison. This consisted of the high term of five years for robbery, plus an additional 10 years pursuant to section 12022.53, subdivision (b), for personal use of a handgun. The court sentenced Chester to three years for possession of a firearm by a felon in count 2, but stayed the sentence pursuant to section 654.

Although the jury convicted Chester only of the charges pertaining to October 24, 2015, the facts regarding the other three counts are relevant to issues Chester has raised on appeal. Consequently, the following description of the evidence introduced at trial includes testimony pertaining to counts that the trial court ultimately dismissed.

A. The Robbery of D.F.

D.F. was returning to his home in Long Beach at around 12:30 a.m. on October 24, 2015 when he noticed a car blocking the driveway. He got out of the car to investigate, and noticed a man riding toward him on a bicycle. The man put a mask over his head, stopped at the back of D.F.'s car, and asked for money. D.F. noticed the man was holding a drill with no drill bit.

D.F. felt afraid and got back into his car. The man reached into the open driver's side window with a gun and pointed it at D.F.'s chest. The man again asked D.F. for money, saying that he knew D.F. must have money because he was driving an expensive car. D.F. looked in the center console of his car and found two scratch-off lottery tickets, one worth \$15, the other worth a free lottery ticket. D.F. handed over the tickets, and the man took them and left. D.F. then called 911. He told the operator that a Black man, approximately 22 years old, riding a BMX bicycle, and wearing a dark sweater with a Pittsburgh Penguins hockey logo, a baseball cap, and a mask, had robbed him of two lottery tickets.

Within a minute or two, Tom Diaz, a police officer with the Long Beach Police Department, responded to a dispatch call regarding the robbery. Near a donut shop on Pacific Coast Highway, a few blocks away from where the robbery had taken place, Diaz saw Chester, who is Black, and who was wearing dark clothing and sitting on a BMX-style bike. Diaz pulled into a nearby driveway and ordered Chester to hold his hands up. Chester rode away on his bicycle and Diaz pursued, eventually catching Chester when Chester crashed his bicycle in the parking lot of a nearby liquor store. During the pursuit, Diaz heard a heavy object fall to the ground near Chester, but he could not see what it was.

Diaz subdued Chester with a carotid restraint, or choke-hold, and rolled him over, discovering a semi-automatic handgun near Chester's waist. Diaz went back to search for the object that had fallen during the chase and found a black cordless drill nearby.

Another Long Beach police officer, Kevin Skeen, who was also on the scene and assisted Diaz in subduing Chester, noticed the handgun on the ground after Diaz handcuffed Chester. Skeen also found a baseball cap with a black cotton cloth stuffed inside it on the ground underneath Chester. The cloth had eye-holes cut out of it so that it could be worn as a mask. Skeen searched Chester's pockets and discovered two scratch-off lottery tickets, one worth \$15, and the other good for a free ticket.

Approximately 30 minutes after the robbery, officers transported D.F. to the liquor store to identify Chester. D.F. saw Chester from the rear seat of the patrol car at a distance of approximately 30 feet. Because D.F. had seen his assailant only with a mask on, he was uncertain whether Chester was the person who robbed him. D.F. thought, however, that Chester had the same height and complexion as his attacker. The police officers put the hat and cloth mask on Chester, and at that point, D.F. was positive Chester was his assailant. In court, D.F.

identified Chester, along with the hat, mask, bicycle, gun, and sweater Chester wore. D.F. also confirmed that the lottery tickets the police recovered were the same tickets stolen in the robbery. D.F. acknowledged that Chester appeared to be in his 30's or early 40's, not approximately 22 years old as he stated to the 911 operator.

Chester testified on his own behalf. He claimed that he never interacted with D.F., and did not rob him. According to Chester, he was in the parking lot of the liquor store with friends when four or five police cars drove up. His friends scattered, and an officer pointed his gun at Chester and ordered him to put his hands up. Other officers grabbed his arms, and when Chester resisted, they choked him until he passed out. Chester denied that he possessed the lottery tickets, the drill, the handgun, the baseball cap, the do-rag, and the bicycle that the police officers testified they found in his possession or near him.

B. Donut Shop Incident

S.K., the owner of a Long Beach donut shop, testified that Chester was a regular at his store. According to S.K., a few days before the robbery, Chester entered the store, demanded that S.K. sell him donuts at a lower price, and asked other customers for money. S.K. argued with Chester, and Chester told him that if he ever saw S.K. outside the store, he would kill him. Chester told S.K. that he had a gun and was not joking. S.K. called the police, but the police never arrived, and eventually Chester left. Another employee of the donut shop, S.S., testified that a Black man who she could not identify came into the store and threatened S.K., and that S.K. called the police. S.S. saw the man put a sock on the counter of the shop, and it appeared that there was a gun inside the sock.

Defense counsel played for the jury surveillance video footage of Chester in the store on the day in question. Chester also testified about the events. He said that on the day in question, he was 10 cents short of the price of a donut and asked S.K. to let him pay the difference in price later. S.K. refused, so Chester asked another customer for a dime. S.K. became angry and told Chester to stop bothering his customers. According to Chester, S.K. told him to get out of the shop and threatened to shoot him.

C. Football Game Assault

C.B. testified that he was a referee of a youth football game on October 4, 2015, about three weeks before Chester's arrest. At halftime, after the referees had made some controversial calls in the game, Chester approached C.B. and another referee and said, "You all refs better call this game right. That's on Crip." After the game, Chester again approached C.B. Chester reached into the front pocket of his hoodie and pulled out a gun wrapped in a plastic bag. Chester pointed the gun at C.B.'s torso and said, "What's up now, ref? This is my neighborhood." According to C.B., the gun was a semi-automatic pistol, and Chester pointed it at C.B.'s stomach from about five feet away. C.B. went back to the field and told the athletic director, who called the police. C.B. later identified Chester from a six-pack lineup as the man who had threatened him, and Chester also identified a picture of the gun recovered from Chester's arrest as the gun used to threaten him.

The coach of the football team for which Chester's son played testified that he witnessed Chester confronting C.B. both at halftime and after the game. According to the coach, Chester pulled out an iPad, rather than a gun.

Chester denied that he brought a gun to the football game and that he threatened C.B. According to Chester, after the game, he told C.B. that it had been a good game even though C.B. had

made a bad call. C.B. then challenged Chester to fight. Chester pulled an iPad from his waistband, and C.B. ran away, shouting that Chester had a gun.

DISCUSSION

Chester raises several contentions on appeal. He contends that the trial court violated his Sixth Amendment rights by denying his requests to substitute counsel and to represent himself. Next, Chester contends that the trial court violated his Fourteenth Amendment right to a fair trial by admitting an in-court identification that was tainted by a suggestive and unreliable out-of-court identification procedure. Finally, Chester contends that the trial court violated his Fourteenth Amendment right to a fair trial by denying his motion to sever the counts pertaining to the donut shop and football game from those pertaining to the robbery.

I. Denial of Chester's Request to Substitute Counsel or to Represent Himself

Chester contends that the trial court violated his constitutional rights by denying his requests, made on the eve of trial, to substitute his retained counsel with another attorney who had agreed to represent him, or to represent himself. We disagree. The trial court did not err by applying an incorrect standard or by finding that Chester's requests were untimely.

A. Relevant Proceedings

On two consecutive days just before trial, Chester requested to replace his attorney with new retained counsel or to represent himself. The first request occurred just before jury selection began, and the second took place after jury selection had already started. The trial court denied these requests.

1. September 16 Proceedings

Just before jury selection began, Chester spoke out in open court, just after the trial court had called the courtroom to order: “Are you saying that the trust that you’re now administering is the Kendrick Chester trust?” The court admonished Chester not to disrupt the proceedings, but Chester continued, saying, “I’m not a fictitious entity. I’m a living human being with a soul. [My attorney] failed to fully disclose to me that he and the prosecutor are involved.” At this point, the court said, “Looks like there’s a *Marsden* motion,” and asked the prosecutor to leave the courtroom during the hearing.³ (*Italics added.*)

In the hearing, Chester alleged that his attorney was colluding with the prosecutor and denied that he was Kendrick Chester or that the court had jurisdiction over him. His attorney explained that he had encouraged Chester to accept the prosecutor’s offer of a 15-year prison term, which was set to expire that day. The trial court then stated, “*Marsden* motion is denied.” (*Italics added.*) Chester complained that his attorney had refused to file certain motions on his behalf, and reiterated that he did not want his attorney to represent him. The court asked, “Do you have anyone to try this case besides him? Who do you have?” Chester answered, “Myself.” The court ended the *Marsden* hearing and invited the prosecutor to return to the courtroom.

Chester then explained that he was not ready to try the case himself, but needed additional time to file motions. He stated that he expected his attorney to have already filed a *Pitchess*⁴ motion and to have subpoenaed certain surveillance footage, and only found out that day that his attorney had not done so. The court told

³ *People v. Marsden* (1970) 2 Cal.3d 118.

⁴ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

Chester that in order to proceed on a pro. per. basis, he would need to sign a document waiving his right to counsel. Chester refused to sign a waiver and refused to speak with the court about it. The court stated, “[B]ecause defendant is unwilling to even follow the basic, basic rules of procedure and courtroom protocol so the court can fairly evaluate the status to go pro[.] per[.], pro[.] per[.] is denied.”

When court was back in session at 1:30 that afternoon, Chester’s attorney informed the court that Chester had obtained new counsel to represent him. The court stated, “[I]f the attorney shows up we’ll deal with it at that point.” Chester decided not to attend further proceedings in the absence of his new attorney, and jury selection proceeded in his absence.

At 2:50 p.m., a new attorney appeared in court and requested to substitute in as Chester’s counsel. The court asked the new attorney to come back the next morning to inform the court whether he was ready to substitute in and begin the trial. For the remainder of the afternoon, Chester’s original attorney continued to represent him in jury selection. At the end of the day, the court instructed the new attorney to return the following morning and explain whether he had been retained as counsel and was ready to proceed. The court continued, “[I]f you say yes, I have no problem allowing you to sub in.”

2. September 17 Proceedings

The next morning, Chester’s proposed substitute attorney appeared and informed the court that he was prepared to take the case through trial on a pro bono basis. He stated that he was not ready to proceed with trial immediately, however, because Chester’s first attorney had not obtained a 911 tape or resolved other discovery issues. After an in-camera hearing, the trial court then found that Chester’s refusal to communicate was a stalling

tactic, and that no genuine conflict existed. The court denied the new attorney's request to substitute in as counsel as untimely.

Shortly thereafter, Chester's attorney informed the court that Chester wanted another *Marsden* hearing. The court answered, "He is not entitled to [a] *Marsden* motion, because [his attorney is] privately retained." (Italics added.) Chester then said, "I would like to go pro[.] per[.] for lack of . . . communication between me and my so-called lawyer." This time, Chester filled out the pro. per. waiver form. When the trial court asked Chester why he had waited so long to request to represent himself, Chester began to describe his conflicts with his attorney. At this point, the court paused the proceedings and excused the prosecutor from the courtroom. The court explained, "[Y]ou are not entitled to a *Marsden* motion, which is basically a request for [a] new attorney, because [your existing attorney] was privately retained by you. But I don't want [the prosecutor] to hear what you have to say because I don't want him to know potential strategy . . . about your case." (Italics added.)

Chester reiterated that he no longer wanted his attorney to represent him because his attorney had failed to file motions that Chester believed were necessary to his defense. Furthermore, Chester complained that his attorney had visited him in jail only once and did not know the details of his case. Chester's attorney responded that he had made a tactical decision not to file a *Pitchess* motion, and that he had investigated but could not find any additional relevant surveillance footage. The attorney also denied that he lacked familiarity with the case, that he failed to communicate sufficiently with Chester, or that he was colluding with the prosecutor.

The trial court then explained that it was willing to grant Chester's request to represent himself, but only if he could be ready to proceed with the case within four days. Chester was unwilling to

proceed with the case without a longer continuance, and the court then told him that it would continue with jury selection, and that he could make a final decision at the end of the day. Later in the afternoon, the court asked Chester for a final decision, and Chester replied that he would need at least 30 days to obtain evidence. The court then denied the request, finding that under the circumstances, the request was untimely.

B. The Denial of the Requests for Substitute Counsel

The standards for responding to a criminal defendant's request to replace his attorney depend on whether he is represented by retained or appointed counsel. Although the Sixth Amendment guarantees criminal defendants who cannot afford to hire an attorney the right to representation by appointed counsel, this "does not include the right to demand appointment of more than one counsel." (*People v. Ortiz* (1990) 51 Cal.3d 975, 980, fn. 1 (*Ortiz*)). When a defendant requests to replace his appointed attorney, the trial court must hold a *Marsden* hearing to determine if the defendant has "show[n] good cause for replacing appointed counsel." (*People v. Lara* (2001) 86 Cal.App.4th 139, 151 (*Lara*)). The court should consider whether the defendant has shown that his " 'right to the assistance of counsel would be substantially impaired if his request [to substitute counsel] was denied.' " (*Ibid.*)

When a defendant retains his own counsel, he has greater freedom to replace his attorney. "In contrast to situations involving appointed counsel, a defendant may discharge his retained counsel of choice at any time with or without cause." (*Lara, supra*, 86 Cal.App.4th at p. 152.) The right to discharge retained counsel is not absolute, however. "The trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not

timely, i.e., if it will result in ‘disruption of the orderly processes of justice.’” (*Ortiz, supra*, 51 Cal.3d at p. 983.)

Chester contends that the trial court erred by applying the *Marsden* standard even though he had retained his own counsel. Chester also argues that, even if the court did apply the correct standard, it erred by finding that Chester’s request was untimely. We are not persuaded by either of these contentions.

Chester is correct that, during the proceedings that took place on September 16, the trial court erroneously described Chester’s request to replace his attorney as a “*Marsden* motion.” (Italics added.) *Marsden* motions and hearings are appropriate only when a defendant is represented by appointed counsel. (See *Ortiz, supra*, 51 Cal.3d at p. 986.) It is clear from the record, however, that the court applied the correct standard in deciding Chester’s request. During proceedings on September 16, the court asked Chester, “Do you have anyone to try this case besides him? Who do you have?” This suggested that, if Chester had retained substitute counsel who was prepared to try the case, the court was prepared to allow the substitution. This was confirmed when Chester’s proposed substitute attorney appeared in court during the afternoon of September 16. The court stated explicitly that it would condition the substitution only on the new attorney’s preparedness to proceed, not on a showing of good cause. The court stated that if the new attorney said that he was ready to proceed with trial, “I have no problem allowing you to sub in.”

During the proceedings on September 17, the court made it even more clear that it was not applying the standard applicable to appointed counsel. On two occasions, the court stated that, because Chester had retained counsel, he was “not entitled to [a] *Marsden* motion.” (Italics added.) Instead, the court conditioned the substitution of counsel only on the attorney’s preparedness.

Chester argues that the court erred by holding closed hearings, in which the prosecutor was excluded from the courtroom, regarding the substitution of counsel. Although closed hearings are necessary in *Marsden* proceedings to allow the defendant to discuss trial strategy without allowing the prosecution to gain an unfair advantage (*People v. Barnett* (1998) 17 Cal.4th 1044, 1094), they serve no apparent function when a defendant seeks to substitute retained counsel. We disagree that the use of this procedure showed that the trial court applied an incorrect standard, however. The court excluded the prosecutor from the courtroom not because it intended to apply an incorrect standard, but because it was clear that Chester intended to discuss his attorney's trial strategy. Although it was not a *Marsden* hearing, excluding the prosecutor was appropriate to protect Chester's right to a fair trial.

Regardless of the court's initial language referring to a *Marsden* hearing or motion, the record shows that when the court made its decision regarding Chester's representation, it applied the standard appropriate for substitution of retained counsel.

Nor do we agree with Chester that the court abused its discretion by denying the motion to substitute counsel on grounds of timeliness. Chester argues that, although he did not request substitute counsel until the day of the trial, his request was nevertheless timely because he only learned that day of his attorney's failure to file a *Pitchess* motion or to seek additional surveillance. He contends that his case is similar to *Lara, supra*, 86 Cal.App.4th at pp. 162-163, in which the court held that the defendant's motion to substitute counsel on the eve of trial was timely because the defendant had only learned of his attorney's deficiencies on the day of trial.

But there are crucial differences between this case and *Lara*. In *Lara*, the trial court incorrectly applied the *Marsden* standard to the defendant's request to discharge his retained counsel. In

rejecting the defendant's request under this standard, the trial court made no finding regarding the timeliness of the request. (See *Lara, supra*, 86 Cal.App.4th at p. 162.) Because the trial court did not apply the correct standard and did not gather and consider all material facts, the Court of Appeal did not defer to the trial court's findings. (See *id.* at pp. 165-166.) Here, by contrast, the court applied the correct standard and explicitly found Chester's request untimely. We may therefore reverse the trial court only if its decision was an abuse of discretion. (See *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1411.)

In *Lara*, the court noted that "there is no evidence to suggest that appellant raised such complaints in an effort to improperly delay the proceedings." (*Lara, supra*, 86 Cal.App.4th at p. 162.) In this case, however, Chester made a series of bizarre statements that he was "not a fictitious entity" and that the court lacked authority to administer his case. Furthermore, his complaints about his attorney's performance appeared to be less substantial than the defendant's in *Lara*. Chester believed that his attorney was scheming with the prosecution apparently on the basis that he did not like the prosecutor's offered plea agreement. He was annoyed that his attorney had failed to obtain surveillance footage that his attorney stated did not exist. And Chester admitted that his attorney spoke with him after each pretrial hearing. In light of this evidence, we cannot conclude that the trial court erred by finding that Chester requested an attorney for the purpose of delaying the proceedings.

To grant Chester's request to replace his attorney would have required a delay in his trial, at a point when both sides had already invested a significant amount of time preparing and when jury selection was about to begin. We do not agree that the trial court abused its discretion by denying the request on the ground that it

would “result in ‘disruption of the orderly processes of justice.’” (*Ortiz, supra*, 51 Cal.3d at p. 983.)

C. Denial of the Requests for Self-Representation

In *Faretta v. California* (1975) 422 U.S. 806, 820-821 (*Faretta*), the United States Supreme Court established that a criminal defendant has a Sixth Amendment right to represent himself at trial. “A trial court must grant a defendant’s request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial.” (*People v. Welch* (1999) 20 Cal.4th 701, 729.) A violation of this right is reversible per se. (*People v. Valdez* (2004) 32 Cal.4th 73, 98.)

In this case, the trial court denied Chester’s requests to represent himself as untimely. Chester contends that this was error. We disagree. In *People v. Lynch* (2010) 50 Cal.4th 693, 724 (*Lynch*), abrogated on other grounds by *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638, our Supreme Court held that “timeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made. An analysis based on these considerations is in accord with the purpose of the timeliness requirement, which is ‘to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.’”

Although Chester contends that a *Faretta* motion may be timely even if it is filed on the first day of jury selection, our Supreme Court has “held on numerous occasions that *Faretta*

motions made on the eve of trial are untimely.” (*Lynch, supra*, 50 Cal.4th at p. 722.) Chester argues that, in this case, he was justified in waiting until the eve of trial to make his motion because it was only then that he discovered his attorney’s alleged inadequacy. For the same reasons that we have cited with respect to Chester’s motion to substitute counsel, however, the trial court was justified in concluding that Chester’s motion was designed to delay trial. Thus, the court did not violate Chester’s Sixth Amendment rights by denying his *Faretta* motion.

II. Identification Procedure

Chester contends that the trial court violated his Fourteenth Amendment right to a fair trial by admitting D.F.’s in-court identification of him, which he claims was tainted by an unduly suggestive and unreliable out-of-court identification procedure. “ ‘In order to determine whether the admission of identification evidence violates a defendant’s right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness’s degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.’ ” (*People v. Virgil* (2011) 51 Cal.4th 1210, 1256.)

We need not determine whether the identification procedure used here violated due process because, even if it did, any error was harmless under any standard of review. (See *People v. Sandoval* (1977) 70 Cal.App.3d 73, 86.) The evidence against Chester at trial was overwhelming. He was arrested mere minutes after the

robbery with several of the items D.F. stated that his attacker had used, including a BMX bike, a handgun, a drill, and a hat with a piece of cloth fashioned into a mask. In addition, police discovered on Chester's person the same scratch-off lottery tickets D.F. reported that the robber stole. Chester's attorney was also able to limit any potential prejudicial effect of the identification by cross-examining D.F. regarding the tenuousness of his identification. (See *People v. Sanders* (1995) 11 Cal.4th 475, 510.) D.F. admitted that he did not get a good look at his attacker and was unable to identify Chester with confidence until the police put the mask on him. He also acknowledged that Chester was much older than his initial estimate of 22 years old, and that Chester was not wearing a sweater with a Penguins logo, as Chester told police. All these admissions during cross-examination reduced the possibility of prejudice to Chester.

III. Joinder of the Charges Against Chester

The Penal Code allows for a single pleading to "charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts." (§ 954.) The trial court, however, "in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (*Ibid.*)

Our Supreme Court has described the following factors to consider in evaluating whether the trial court abused its discretion by refusing to sever charges in a particular case: "(1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; (3) has a weak case been joined with a strong

case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) is any one of the charges a death penalty offense, or does joinder of the charges convert the matter into a capital case.” (*People v. Marshall* (1997) 15 Cal.4th 1, 27–28.)

Chester contends that the trial court abused its discretion by refusing to sever the charges pertaining to the robbery (counts 1-2) from those pertaining to the events at the donut shop and the children’s football game (counts 3-5). He argues that because the evidence from the various counts was not cross-admissible, and there was a spillover effect between stronger and weaker cases, the charges should have been severed. We are not persuaded.

Although cross-admissibility of evidence is ordinarily sufficient to dispel any inference of prejudice and show that the trial court acted within its discretion by denying severance, “ ‘lack of cross-admissibility is not dispositive of whether the court abused its discretion.’ ” (*People v. Romero and Self* (2015) 62 Cal.4th 1, 30.) We need not decide whether the evidence would have been cross-admissible in this case because an examination of the remaining three factors shows that the trial court did not abuse its discretion. (See *ibid.*) The second and fourth factors do not aid Chester because none of the charges against him were significantly more inflammatory than the others, and this was not a capital case.

As to the third factor, there was no large disparity between the strength of the various charges against Chester. Although the jury was unable to reach a unanimous verdict on counts 3-5, the evidence against Chester on those counts was strong. With respect to the incidents at the donut shop and at the football game, witnesses with no apparent reason for animus against Chester testified that Chester threatened them. In each case, a witness testified to seeing Chester with a firearm, and in the case of the

football game, the witness testified that Chester pointed the weapon at him. In each instance, a witness identified Chester as the perpetrator from a photo lineup. At the time the trial court denied Chester's motions to sever the charges, the court knew that the prosecution intended to offer this evidence at trial. (See *People v. Marshall, supra*, 15 Cal.4th at p. 27 [court reviews trial court's decision on joinder on the basis of the facts known at the time of the trial court's ruling].) Thus, the trial court did not abuse its discretion by denying Chester's motion to sever counts 3-5.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.